decision requires that educational agencies consider a child's unique needs and characteristics – in particular, the child's capacity to progress under a given educational program – in considering what constitutes a FAPE. This holding is entirely consistent with the holdings of other courts of appeals – including those that use the "some benefit" language – and with this Court's decision in *Rowley*, which recognized that there is no single standard that applies to the infinite range of needs, characteristics, and capacities of disabled children. Moreover, even if there is some minor divergence among the courts of appeals, this case presents a poor vehicle for this Court's consideration of the issue. The Sixth Circuit remanded to the district court for a determination of whether Petitioner committed a substantive violation of IDEA. If no such violation is ultimately found, Petitioner's challenge to the Sixth Circuit's "meaningful benefit" standard will be moot. On the other hand, if a violation is found, Petitioner will have another opportunity to raise the issue at that time. Accordingly, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Zachary Deal's Disability And Petitioner's IEPs

Zachary has been diagnosed with autism and verbal dyspraxia. Pet. App. 63a, 72a, 85a. In 1997, after being diagnosed with autism at age two-and-a-half, Zachary was referred to the Tennessee Early Intervention System. Pet. App. 73a-74a. Zachary's intelligence could not be tested at this point because he had not reached the age of two in development. Pet. App. 73a. Zachary was subsequently referred to Petitioner to develop an IEP. Pet. App. 74a. Zachary's first IEP meeting was held on July 30,

1997. *Id.* No regular education teacher attended this meeting. Pet. App. 75a. Zachary's first IEP placed him at the Ooltewah Elementary School in a special education class with other disabled children, and provided for ninety minutes of speech therapy each week. Pet. App. 75a-76a. In October, the IEP was revised to include 45 minutes of speech therapy a day. Pet. App. 75a.

The Deals learned about Lovaas-style applied behavioral analysis intervention ("ABA") in August of 1997, shortly after Zachary began attending Ooltewah. Pet. App. 64a, 75a. ABA is a systematic approach to teaching young autistic children based on operant conditioning. It was developed at the Psychology Department of the University of California at Los Angeles in the 1980s, and has been subject to the most reliable studies and testing of any therapy for autism. Pet. App. 64a-65a, 78a-81a, 85a, 89a. After studying ABA, the Deals secured ABA services for Zachary at their own expense, selecting a program administered by the Center for Autism and Related Disorders. Pet. App. 64a, 85a, 91a.

Petitioner held several IEP meetings with the Deals in the Spring of 1998, Pet. App. 76a-77a. During these meetings, Petitioner recommended that Zachary cut back to part-time attendance at Ooltewah so he could devote more time to ABA therapy. Pet. App. 77a. Petitioner was impressed with the progress Zachary was making as a result of his ABA program. Pet. App. 78a, 85a. Indeed, Zachary tested at 93 on an IQ test administered in April 1998. Pet. App. 82a. Before the Deals requested funding for Zachary's ABA program from Petitioner, it had flagged Zachary's education program as a "sensitive case" under Petitioner's policy of rejecting any and all requests for ABA for young autistic children. Pet.

App. 86a. At an IEP meeting held on May 11, 1998, the Deals presented the results of Zachary's ABA program and requested that Petitioner incorporate ABA into Zachary's IEP. Pet. App. 77a-78a, 86a. Petitioner rejected the Deals' request, reasoning that it could not give the same ABA services to everyone, Pet. App. 77a, and citing cost as a significant factor in its decision. Pet. App. 86a. Petitioner also informed the Deals that it could not provide ABA for Zachary because "the powers that be" were not implementing ABA programs and instead recommended Petitioner's own program for autistic children. Pet. App. 77a-78a, 86a.

Selecting the wrong methodology for an autistic child can mean the difference between an independent adult life and a lifetime of dependency and support. Pet. App. 107a. Petitioner's program is not based on any single methodology, but is cobbled together from various components of other methodologies for treating autistic children. Pet. App. 82a, 101a. The largest component of Petitioner's "eclectic" program is derived from a system called "TEACCH," a cradle-to-grave system based on the assumption that the core clinical problems of autism are lifelong. Pet. App. 81a-82a, 101a. Petitioner has never acceded to the Deals' requests for data on the efficacy of Petitioner's program, Pet. App. 3a, 78a, 98a-99a, 101a, 107a, although the Deals have never refused a request for information from Petitioner about Zachary or his ABA program. Pet. App. 88a. Petitioner has little or no expertise in ABA, Pet. App. 89a, and has low expectations for autistic children, believing that it is unrealistic to try to help Zachary develop a relatively normal life of independence. Pet. App. 89a. In fact, Petitioner has never provided ABA services to any autistic child, Pet. App. 78a, and

Petitioner's personnel even have a manual titled "How to Avoid Parents' Demands for Lovaas." Pet. App. 23a-24a n.12. Petitioner's personnel also demonstrated "an appalling lack of interest" in exploring improved and proven methodologies such as ABA. Pet. App. 101a, n.4. As a result, Petitioner based Zachary's IEP on a system designed for autistic children incapable of making academic progress or IQ gains like those Zachary had already demonstrated under ABA.

Although in May 1998 Petitioner refused to make ABA services part of Zachary's IEP, Pet. App. 78a, Extended School Year Services were made part of the IEP. Pet. App. 77a. The Deals continued to privately fund Zachary's ABA program and speech therapy. When Petitioner reconvened the IEP meeting in October of 1998, the Deals again asked that Petitioner include ABA services. But Petitioner again refused. The Deals proposed approximately 600 goals for Zachary's IEP; Petitioner countered with 78 goals. Pet. App. 83a-84a. Eventually, Zachary's 1998 IEP included 137 goals. Zachary achieved 99 of them, along with 130 goals that Petitioner refused to include in his IEP. *Id.* No regular education teacher, who taught Zachery, attended the October 15, 1998 IEP meeting. Pet. App. 86a. Petitioner failed to interview any of the ABA providers even though ABA constituted the bulk of Zachary's educational program at the time. Pet. App. 84a.

Nor did a regular education teacher participate in the February 1999 meeting, and Petitioner informed the Deals that they could not ask questions at the March 3, 1999 meeting. Pet. App. 83a. An IEP meeting was held again in the Spring of 1999 to develop Zachary's IEP for the summer. *Id.* Although his 1998 IEP had included summer services, and even though Zachary was exhibiting emerging speech

and language skills, Petitioner denied the Deals' request for summer services in 1999. Pet. App. 83a, 90a, 104a, 105a. Petitioner also failed to provide Zachary with speech and language services until over four months into the school year and only provided a fraction of the prescribed occupational therapy even though Zachary's IEP included these services. Pet. App. 112a. Although Petitioner refused to provide any services during the summer of 1999, the Deals continued to provide ABA, speech therapy and occupational therapy during that time period. *Id.*

Zachary was tested in June of 1999. As a result of the ABA program, he scored twelve points higher on his IQ test than the previous year and had made "tremendous progress" in his interpersonal and reasoning skills. Pet. App. 84a. In fact, Zachary had progressed to the point where he was ready to be educated in a regular classroom with his typically-developing peers. *Id.* But when an IEP meeting was held on August 20, 1999, no regular education teacher was present. Pet. App. 90a. At the next meeting on August 25, the regular education teacher left the meeting before Zachary's goals and objectives were developed and before placement was decided. Pet. App. 87a. The Deals asked Petitioner to place Zachary in regular education classes to the maximum extent possible, but Petitioner proposed that Zachary attend regular education classes for fifteen minutes, three times a week. Pet. App. 110a. The proposed IEP would have placed Zachary for a year in a classroom where every single child was disabled. Pet. App. 111a. The Deals rejected this proposed IEP and withdrew Zachary from the public education system and enrolled him at the Primrose School, a private school, where he attended regular education classes with an aide. Pet. App. 88a, 111a. The Deals

provided Zachary with ABA, speech therapy and occupational therapy while he attended Primrose. Pet. App. 66a, 88a. Notably, Zachary did quite well at Primrose, where he fit in well with his peers, adopted their normal behaviors, acquired new skills and was, academically, one of the better students in his class. Pet. App. 87a, 88a. Notably, Zachary acquired new skills in proportion to the number of ABA hours received. Pet. App. 88a. Indeed, in the summer of 2000, Zachary's IQ tested another 26 points higher than his last score. Pet. App. 90a.

Notwithstanding Zachary's gains, Petitioner again refused to provide Zachary with extended school year services for the summer of 2000, and the Deals were forced to continue providing Zachary with an ABA program, speech therapy and occupational therapy. Pet. App. 105a. In August 2000, Petitioner developed an IEP for Zachary that provided placement at a public school, Westview Elementary, in regular education classes. Pet. App. 91a. The Deals again requested that the IEP include ABA services, and again Petitioner denied the request. *Id.* Petitioner even refused the Deals' offer to help train Petitioner's personnel on Zachary's ABA programs and protocols. Pet. App. 92a.

B. Tennessee's Decision

Zachary's parents sought relief under IDEA and Tennessee held a hearing on the Deals' claims, presided over by an administrative law judge with special training in physical and mental disabilities and special education programming. *See* TENN. COMP. R. & REGS. 0520-1-9-.14(10)(c)(4) (2005). The hearing lasted twenty-seven days and involved testimony from twenty fact and expert witnesses, tens of thousands of

pages of documentary evidence and exhibits, several videotapes of Zachary, and the administrative law judge's personal observation and evaluation of Zachary in five different settings at Petitioner's request. Pet. App. 67a. At the completion of the proceedings, Tennessee concluded that Petitioner had denied Zachary a FAPE and that the Deals were entitled to reimbursement for some of the expenses they had incurred in providing appropriate educational services for Zachary. Pet. App. 106a-14a.

Specifically, Tennessee found, *inter alia*, that (1) Petitioner prevented the Deals from effectively participating in the development of Zachary's IEP by adopting a blanket policy that no autistic child in Hamilton County would be provided with an ABA program, no matter how effective and appropriate that program might be for the child, Pet. App. 78a, 86a, 90a, 98a, 99a, 102a, 108a; (2) Petitioner failed to have regular education teachers present, as required by IDEA, at critical IEP meetings, Pet. App. 83a, 86a-87a, 90a, 99a; (3) Petitioner failed to make ABA services a part of Zachary's IEP, despite his remarkable progress with the ABA program that the Deals provided at their own expense, Pet. App. 70a, 98a, 101a, 102a, 103a, 104a, 108a; (4) Petitioner failed to provide Zachary a FAPE by refusing to provide educational and related services during the summer, even though Petitioner's acknowledged that Zachary would regress without those services, Pet. App. 104a-6a; (5) Petitioner failed to educate Zachary in regular education classrooms to the maximum and appropriate extent possible, Pet. App. 109a-11a; (6) Petitioner frequently failed to deliver speech and occupational services that were made part of Zachary's IEPs. Pet. App. 112a-3a; (7) Petitioner failed to provide a proven or even describable methodology for educating autistic children, Pet. App. 101a; and (8) Petitioner failed

to provide an objective, measurable, and sufficient number of goals for the IEP. Pet. App. 109a.

Tennessee also explicitly found that Zachary would not make progress under Petitioner's proposed IEPs, and that they would, in fact, *retard* his growth. Pet. App. 7a n.6, 103a-4a. Tennessee determined that Zachary's greatest gains occurred during the periods when he received no services from the Petitioner. Pet. App. 92a. Indeed, *Petitioner's own expert witness testified* that ABA services needed to be a part of Zachary's program, Pet. App. 68a, 93a-94a, and that Petitioner's program does not address some of the primary deficits of children with autism. Pet. App. 95a.

C. District Court Proceedings

The Deals and Petitioner each sought review of portions of Tennessee's decision. Petitioner introduced testimony from six new witnesses and twenty-four new exhibits. Pet. App. 9a. Riding roughshod over explicit factual findings and credibility determinations, Pet. App. 61a-62a, the district court concluded that Tennessee should have deferred to the IEPs developed by Petitioner, Pet. App. 57a-60a, and found that the IEPs would have resulted in adequate progress despite Tennessee's conclusion to the contrary. Pet. App. 60a.

D. Sixth Circuit's Decision

The Sixth Circuit went though the voluminous record and held, as Tennessee's factual and legal findings support, that Petitioner procedurally violated IDEA and deprived Zachary of a FAPE by (a) unilaterally "predetermining" Zachary's

educational placement and program prior to Zachary's Individual Education Plan ("IEP") meetings; (b) repeatedly failing to ensure the statutorily mandated attendance of a "regular education teacher" at four of Zachary's IEP meetings; (c) maintaining and implementing an "unofficial policy" that prevented Petitioner from individualizing Zachary's IEP; and (d) depriving Zachary's parents of any "meaningful" involvement and participation in the IEP process. Pet. App. 6a, 24a-25a, 27a-29a, 31a-32a.[1] The Sixth Circuit held that the Deals had carried their burden of demonstrating the foregoing procedural violations, which, in and of themselves, deprived Zachary of a FAPE. Pet. App. 21a-32a.

The Sixth Circuit also remanded to the district court the issue of whether Petitioner committed a substantive violation of IDEA by failing to provide Zachary with an IEP that would have afforded him any meaningful benefit. Pet. App. 33a-40a. In doing so, the Sixth Circuit concluded that IDEA requires that benefits under an IEP need to be tied to the individual abilities of the child so that the IEP has some meaning – *i.e.*, a "meaningful benefit." Pet. App. 40a. According to the Sixth Circuit, it is insufficient to have "some benefit" that has meaning to another child, but none to the child at issue.

The Sixth Circuit – far from permitting the Deals to "dictate unilaterally" Zachary's placement, Pet. 19, – merely concluded that Tennessee's factual findings as to

[1] Contrary to Petitioner's position, this Court's grant of certiorari in *Schaffer v. Weast*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (No. 04-698), an appeal dealing with the allocation of burdens of proof, is irrelevant to this appeal. Here, the Sixth Circuit placed the burden of proof on the *parents*, not Petitioner. Pet. App. 18a.

the appropriate education for Zachary were entitled to greater deference than that accorded by the district court:

> What seems to have been overlooked by the district court in this case is that the ALJ is a representative of the state presumed to have both the educational expertise and the ability to resolve questions of educational methodology that the federal courts do not have. . . . The district court does not appear to have accorded due deference to the ALJ's findings especially in areas touching upon the ALJ's presumed educational expertise.

Pet. App. 39a-40a; *see also* TENN. COMP. R. & REGS. 0520-1-9-.14(10)(c)(4) (2005). The Sixth Circuit did not determine the level of benefits that are appropriate for Zachary, but remanded the issue to the district court for a careful weighing of the equities, giving due deference to Tennessee's findings, and taking into consideration Zachary's individual abilities. Pet. App. 40a.

Petitioner filed for *en banc* review, but not a single judge sitting on the Sixth Circuit voted in favor of granting the application. Pet. App. 115a.

THE PETITION SHOULD BE DENIED

I. The Highly Fact-Specific Predetermination Holding Resulted From The Application Of Uniformly-Accepted Legal Standards To This Complex Factual Record

The Sixth Circuit held that Petitioner impermissibly predetermined decisions relating to the educational support it would provide to Zachary. In reaching this

conclusion, the Sixth Circuit cited to no fewer than fifteen specific factual findings made by Tennessee. On that basis, the court stated:

> The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program. This conclusion is bolstered by evidence that the School System steadfastly refused even to discuss the possibility of providing an ABA program, even in the face of impressive results. Indeed, School System personnel openly admired and were impressed with Zachary's performance (presumably attained though the ABA program), until the Deals asked the School System to pay for the ABA program. Several comments made by the School System personnel suggested that they would like to provide Zachary with ABA services, *i.e.* they recognized the efficacy of such a program, but that they were prevented from doing so, *i.e.*, by the School System policy. The clear implication is that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services. This is predetermination.

Pet. App. 26a-27a.

Petitioner incorrectly contends that the Sixth Circuit "deemed it improper for Petitioner to consider the expense of Lovaas-style ABA." Pet. 21. Actually, the Sixth Circuit specifically recognized that "[a] school district unquestionably may consider cost in determining appropriate services for a child." Pet. App. 28a (citation omitted). What a school district may not do, however, is decide prior to an

IEP meeting that it would only provide one type of therapy to an autistic student merely because it made a prior investment, no matter what the individual child's needs and capabilities. *Id.* The undisputed record is that Petitioner decided prior to the IEP meeting that it would use a variant of TEACCH – a program that may be appropriate for some children, but was inappropriate for Zachary – because it had invested money in that program. *Id.* As emphasized by the Sixth Circuit:

> The school district is required, however, to base its placement decision on the child's IEP, 34 C.F.R. § 300.552, rather than on the mere fact of a pre-existing investment. In other words, the school district may not, as it appears happened here, decide that because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability, *regardless of any evidence to the contrary of the individualized needs of a particular child*. A placement decision may only be considered to have been based on a child's IEP when the child's individual characteristics, including demonstrated responses to particular types of educational programs, are taken into account.

Pet. App. 28a-29a (emphasis in original).[2] While cost can therefore be considered, "[a] school system should not make placement decisions on the basis of financial considerations alone." *Hanson v. Smith*, 212 F. Supp. 2d 474,

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[2] As Tennessee also recognized, IDEA does not require a Cadillac, only a serviceable Chevrolet. Pet. App. 99a-100a. Tennessee stated that IDEA "does, however, require [Petitioner] to make sure whichever vehicle they propose, is fully gassed and capable of arriving at the appropriate destination. The appropriateness of the destination is dependent to a large extent on the child's abilities and potential." *Id.*

482, *citing, Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991).[3] Here, Petitioner made decisions solely based upon cost and, in violation of the statute, failed to come to the IEP meeting with an open mind. *N.L. ex rel. Ms. C. v. Knox County Schs.*, 315 F.3d 688, 694-95 (6th Cir. 2003).

The court of appeals ruling in this regard is correct and, as especially relevant here, raises no issue of general importance. Rather, it simply applies well-settled law to the facts of this case as meticulously developed in proceedings before Tennessee. Accordingly, the court of appeals predetermination ruling presents no occasion for review by this Court. *See* Sup. Ct. R. 10.

II. This Case Does Not Present A Genuine Circuit Split

The primary reason Petitioner advances for granting certiorari is the alleged existence of a "clear circuit split," Pet. 11, regarding the meaning of a "free appropriate public education" under IDEA. According to the petition, a majority of circuits "squarely reject," Pet. 12, a "stringent," Pet. 17, "meaningful benefit" standard in favor of a "modest," Pet. 12, "some benefit" test. Pet. 11-18. There is no such split. All circuits agree on the basic principles that guide the analysis of whether a disabled child has been provided a FAPE. All circuits, agree that states are not required to maximize a disabled child's ability to fulfill his

[3] As for Petitioner's argument that it may withhold ABA therapy from Zachary because "of the expense of providing such therapy on a system-wide basis," Pet. 21, this Court rejected the sole use of cost as the basis for defining the required services under IDEA. *Cedar Rapids Cmty. Sch. Dist. v. Garret ex rel. Charlene*, 526 U.S. 66, 77-78 (1998).

or her full academic potential. All circuits also agree that IDEA requires that the individual child's unique, individual characteristics and capabilities be considered when evaluating whether he or she has received a FAPE.

The cases Petitioner cites do not demonstrate any split. The "split" Petitioner identifies is, at most, a split based on semantics. Many circuits ostensibly identified in the petition as "some benefit" courts cite to "meaningful benefit" cases for the appropriate standard under IDEA. Petitioner has not articulated what distinguishes the "some educational benefit" standard from the "meaningful educational benefit" standard. Petitioner suggests that the "meaningful benefit" standard is more "stringent" and "subjective" than the "some benefit standard," Pet. 17, although it is not clear how this is so.[4] It also suggests that the "meaningful benefit standard" is somehow commensurate with potential-maximization, Pet. 15; but the Sixth Circuit has flatly rejected potential-maximization as a standard.

The Sixth Circuit clearly explained what it meant by a "meaningful benefit:" that a disabled child's individual characteristics – *i.e.*, his or her capacity to respond to the available educational methodologies – is one factor that

[4] Petitioner may believe that the test was applied too stringently in this case, but that does not show that there is a genuine circuit split on the meaning of IDEA. Petitioner cites to the Sixth Circuit's dicta in footnote 17 that a FAPE may require self-sufficiency, where self-sufficiency is a realistic goal. Pet. 15. This sentiment is perfectly consistent with *Rowley*, which rejected self-sufficiency as a universal goal because it would be unattainable for some disabled children. 458 U.S. 176, 201 n.23 (1982). But even if this dicta applies the benefit standard too heavily, this Court does not grant certiorari to correct dicta. *See* Sup. Ct. R. 10.

must be considered when deciding what a FAPE is for that child. Pet. App. 34a, 38a. The Sixth Circuit's ruling is in harmony with every other circuit that has considered the issue and is consistent with this Court's analysis of IDEA in *Rowley* and with the text and legislative history of IDEA.

A. All Circuits Agree On The Principles Governing The Fact-Specific Inquiry Of What Constitutes A FAPE

This Court noted over twenty years ago that the statutory definition of a FAPE "tends toward the cryptic rather than the comprehensive," *Rowley*, 458 U.S. at 188, but that the statutory text and legislative history of the EHA (IDEA's predecessor) provide sufficient clues to make the requirement "tolerably clear." 458 U.S. at 203. First, Congress was concerned that disabled children be provided meaningful access to public education. 458 U.S. at 191-2, 194 n.18. Second, Congress was concerned with providing an education that would be appropriate for each individual child, rather than enforcing equality of educational opportunity[5] – a standard too high for some children – or equality of educational services – a standard too low for others. 458 U.S. at 198-9. Third, disabled children vary widely in their characteristics and abilities, and respond to different educational services with equal variety. In light of these individual variations, Congress required that the education provided must be specifically tailored to each

[5] The equality-of-opportunity standard required by the district court in *Rowley*, and rejected by this Court, is often referred to as "potential-maximizing" in subsequent cases. *See, e.g., Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (citing *Rowley*, 458 U.S. at 197 n.21 & 200-01).

individual disabled child. 458 U.S. at 181, 201-2, 203. Fourth, Congress expressed a strong preference for "mainstreaming" where possible. 458 U.S. at 202-3. Indeed, Congress sought to make educational services available that might enable disabled children to reduce their dependence on society, and perhaps even to find gainful employment and become contributing members of society. *See Rowley*, 458 U.S. at 201 n.23; 20 U.S.C. §§ 1400(a)(5)(E) and (d)(1)(A). Finally, the standards established for judicial actions to review state administrative hearings dictate that courts are to give appropriate deference to state educational policy decisions. 458 U.S. at 206.

In *Rowley*, this Court did not decide what would constitute an appropriate education in a substantive sense. It expressly declined to "establish any *one* test for determining the adequacy of educational benefits conferred upon *all* children covered by the Act." 458 U.S. at 202. *Rowley* found that a disabled hearing impaired child who was participating in regular education classes with her non-disabled peers, where she advanced easily from grade to grade and, in fact, performed at an above-average academic level, was receiving a FAPE. 458 U.S. at 203 n.25.

Thus, what constitutes a FAPE for each disabled child is a case-by-case analysis, highly dependent on the individual characteristics of the child. 458 U.S. at 188-89, 201. The courts of appeals uniformly recognize this principle, and also uniformly recognize the applicability of the principles established in *Rowley*: (1) a FAPE requires

meaningful access to educational services,[6] 458 U.S. at 191-2, 194 n.18; (2) a FAPE does not require that a disabled child be provided educational services that allow the child to maximize his or her academic potential,[7] 458 U.S. at 198; (3) what constitutes a FAPE depends on the unique individual characteristics and abilities of the child,[8]

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[6] *See, e.g., JSK ex rel JK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991); *Butler v. Evans*, 225 F.3d 887, 894 (7th Cir. 2000); *Kings Local Sch. Dist. Bd. of Educ. v. Zelazny*, 325 F.3d 724, 729 (6th Cir. 2003); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1047 (5th Cir. 1989); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998).

[7] *See, e.g., Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (IDEA does not require the "absolutely best or 'potential maximizing' education"); *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) ("IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense"); *School Bd. of Henrico County v. Z.P. ex rel. R.P.*, 399 F.3d 298 (4th Cir. 2005) ("Act does not require the furnishing of every special service necessary to maximize each handicapped child's potential"); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 379 (2d Cir. 2003) (same).

[8] *See, e.g., Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (what constitutes appropriate compensatory education is a fact-specific inquiry); *Walker County Sch. Dist. v. Bennett ex rel. Bennett*, 203 F.3d 1293, 1296 n.10 (11th Cir. 2000); *JSK ex rel. JK v. Henry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991) (adequacy is to be determined on a case-by-case basis in light of individual child's needs); *O'Toole ex rel. O'Toole v. Olathe Dist. Sch. Unified Schs. Dist. No. 233*, 144 F.3d 692, 700 n.6 (10th Cir. 1998) (appropriate education under both Kansas law and IDEA provides "educational benefits in the context of [] the individual's particular abilities or capacities"); *Missouri Dept. of Elementary & Secondary Educ. v. Springfield R-12 Sch. Dist.*, 358 F.3d 992, 998-99 (8th Cir. 2004) ("A specialized course of instruction must be developed for each disabled student, taking into account that child's capabilities"); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (whether mainstreamed education is appropriate is an "individualized, fact specific inquiry"); *MM ex rel. DM*

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458 U.S. at 181, 201-3; and (4) a FAPE should enable disabled children to be educated with their non-disabled peers to the extent possible,[9] 458 U.S. at 202-3.

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v. Sch. Dist. of Greenville County, 303 F.3d 523, 537 (4th Cir. 2002) ("whether services beyond the regular school day are essential . . . is necessarily fact and case specific"); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 177 (3d Cir. 1998) (explaining that the "system of procedural protection only works if the state devises an *individualized* program and is willing to address the handicapped child's 'unique needs.'") (emphasis in original, internal citations omitted); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 338 (2d Cir. 2005) ("IDEA cases [] are fact-intensive inquiries about the child's disability and the effectiveness of the measures that school boards have offered to secure a free appropriate public education"); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991 (1st Cir. 1990) (noting that "academic potential is one factor to be considered" when formulating an IEP). *See also Rowley*, 458 U.S. at 201 (concluding that the Act requires "access to specialized instruction and related services which are *individually designed* to provide educational benefits for the handicapped child.") (emphasis added).

[9] *See, e.g., Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025 (1992), *and reinstated*, 967 F.2d 470 (1992); *Murray ex rel. Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 926 n.9 (10th Cir. 1995) (quoting 20 U.S.C. § 1412(5)(B)); *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 656-57 (9th Cir. 2005) (Gould, J., concurring); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 661 (8th Cir. 2000) (describing mainstreaming as one of the "primary objectives" of the IDEA); *Casey K. ex rel. Norman K. v. St. Anne Cmty. H.S. Dist. No. 302*, 400 F.3d 508, 512 (7th Cir. 2005) (noting the statutory preference for mainstreaming); *McLaughlin v. Holt Public Sch. Bd of Educ.*, 320 F.3d 663, 672 (6th Cir. 2003) (noting that "the plain language of the requirement in the Act clearly commands schools to mainstream disabled children as much as possible."); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989); *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 681-82 (4th Cir. 2004) (same); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (explaining that the mainstreaming mandate "require[s] that a disabled child be placed in the least restrictive environment. . . ."); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 379 (2d Cir. 2003) (same); *Roland M. v. Concord Sch. Comm.*, 910 F.2d

(Continued on following page)

B. The Sixth Circuit Applied These Well-Understood General Principles

The Sixth Circuit applied the principles established by this Court to the inherently fact-specific inquiry of what constitutes a FAPE for Zachary. As a result, the Sixth Circuit concluded that the district court had erred by (1) failing to give due weight to Tennessee's factual findings, especially those findings regarding educational policy, Pet. App. 39a-40a; and (2) failing to consider Zachary's unique, individual characteristics and needs – in particular, his capacity to respond to various educational services – when deciding whether Petitioner provided him with a FAPE, Pet. App. 32a-39a. On remand, the Sixth Circuit tasked the district court with evaluating Petitioner's proposed educational services with these considerations in mind. Pet. App. 40a.

The Sixth Circuit's holding that the extent to which a disabled child is capable of benefiting from the available educational methodologies is an appropriate factor to consider when determining whether a school district has provided that child with a FAPE, is perfectly consistent with a principle uniformly recognized by the courts of appeals that the determination of what constitutes a FAPE for a particular child is a case-by-case, fact-specific inquiry that necessarily turns on the child's individual characteristics. Pet. App. 38a. Likewise, the principle applied by the Sixth Circuit in reaching its holding, that IDEA does not require services that maximize the potential of each individual child, is also accepted by all circuits. Pet. App. 20a (quoting *Rowley*, 458 U.S. at 200-01).

983, 992-93 (1st Cir. 1990) ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria."). *See also Cedar Rapids*, 526 U.S. at 78.

C. Petitioner's "Circuit Split" Is Based On Semantics Rather Than A Genuine Split In The Law

The cases cited by Petitioner as evidence of the "clear circuit split" actually show the opposite – that there is no circuit split about whether a child's individual characteristics, including the extent to which the child is capable of benefiting from different educational services, is an appropriate factor to consider when determining if Petitioner has provided a FAPE. Moreover, other cases from these "majority" circuits approve of the articulation of standards governing a FAPE as set forth by the "minority" circuits, demonstrating that the courts of appeals do not perceive any meaningful difference between the so-called "some benefit" and "meaningful benefit" standards.

In three of the cases cited as "squarely rejecting" a meaningful benefit standard (from the Fourth, Tenth and Eleventh Circuits), the courts simply reject a "potential maximizing" standard.[10] The courts do not reject a meaningful benefit standard as articulated and applied by the Sixth Circuit; *i.e.*, a standard that requires a non-trivial educational benefit and an evaluation of the child's individual capacity to respond to the available educational

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[10] Pet. 11; *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004) (rejecting potential maximization, and finding that the state must provide "meaningful access," with a FAPE that confers "some educational benefit") (citations omitted); *O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 700 (10th Cir. 1998) (disagreeing with the O'Tooles' argument that Kansas requires services to "maximize each child's potential"); *JSK ex rel. JK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991) (explaining that access must be meaningful, and is meaningful when sufficient to confer *some* benefit, that is, not necessarily a benefit that would achieve the child's maximum potential).

services. Another case cited in the petition as "squarely rejecting" a meaningful benefit standard (Seventh Circuit) explicitly *does not* reject that standard; it simply notes that a meaningful benefit standard may be slightly more stringent than a some benefit standard, but holds that the IEP at issue in that case met both tests. *Todd v. Duneland Sch. Corp.*, 299 F.3d 899, 906 n. 3 (7th Cir. 2002). The remaining three cases cited in the petition as "squarely rejecting" a meaningful benefit standard (First, Eighth and D.C. Circuits) do not address the substantive prong of a FAPE inquiry. Two of the three deal with the scope of the remedy that can be awarded to a successful IDEA litigant,[11] while the third deals with the division of responsibility between state and local educational authorities when the local agency lacks the resources to provide a FAPE.[12]

JSK, heavily relied upon by Petitioner, rejects a meaningful benefit standard, but appears to equate a benefit with potential-maximizing. 941 F.2d at 1572-73 (rejecting "meaningful educational benefits" and distinguishing "some or adequate educational benefits" from "maximum improvement"). There, the Eleventh Circuit did not hold that a child's potential to respond to various

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[11] *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (construing equitable jurisdiction to craft appropriate relief); *Maine Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R.*, 321 F.3d 9 (1st Cir. 2003) (considering validity of attorneys' fees claim and justiciability of compensatory education claim).

[12] *Missouri Dept. of Elementary & Secondary Educ. v. Springfield R-12 Sch. Dist.*, 358 F.3d 992, 1002 (8th Cir. 2004) (holding that "Missouri statutes make clear that given the facts of the instant case, the 'buck' stops with the Missouri Department of Elementary and Secondary Education.").

educational services is an impermissible consideration when determining what constitutes a FAPE for that child. On the contrary, it recognized that the inquiry is specifically tailored to the individual characteristics of the child. *Id.* at 1573. Similarly, in *A.B. ex rel. D.B. v. Lawson*, the Fourth Circuit emphasized that *Rowley* required only "*some* educational benefit" as opposed to services necessary to maximize the disabled child's potential. 354 F.3d at 319. There, the primary issue was the district court's failure to give due weight to the factual findings of the state hearing officer, including findings that the child was making academic progress in the public education system. *Id.* at 328 (child's reading level increased two grade levels while in the public school system); *id.* at 321-22 (child made satisfactory grades and received favorable comments from regular education teacher). The state was therefore not required to reimburse A.B.'s parents for the costs of a private school that provided A.B. with an "ideal" environment. *Id.* at 330. Both *A.B.* and *Rowley* are cases wherein a child, who could be excelling if given more resources but who is nonetheless progressing normally in regular education classes, is said to receive a FAPE.

As in *A.B.* and *JSK*, the Tenth Circuit in *O'Toole v. Olathe District Schools Unified School District No. 233* held that an IEP is not inappropriate simply because it does not provide for the best possible program. There, a hearing disabled child was attending both regular and special classes in the public school system. 144 F.3d at 695-96. She apparently began experiencing academic difficulties after her mother died and her father remarried, yet continued to make steady, if uneven, academic progress. *Id.* at 696. After a private evaluation, her parents requested additional educational and related services,

many of which were incorporated into her IEP. *Id.* at 707. Her parents nonetheless enrolled her in a private school and asked for reimbursement from the school district. Reimbursement was denied because, although the private school may have helped maximize her potential, the parents did not demonstrate that the IEP developed by the school district was inappropriate. *Id.* at 708. *O'Toole* did not, however, reject or even address the meaningful benefit standard. In fact, it favorably cited a Second Circuit case, *Walczak v. Florida Union Free School District* (counted as a meaningful benefit circuit by the Petitioner), as well as an earlier Tenth Circuit case, *Johnson ex rel. Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990), that relies on the Third Circuit's *Polk* decision for the standards that govern whether an IEP provides a FAPE. 144 F.3d at 708 (citations omitted).

In *Todd*, the Seventh Circuit neither adopted nor rejected a meaningful benefit standard. The court indicated that a meaningful benefit standard may be "slightly more stringent" than a some benefit standard, but held that the difference between the two standards was immaterial because the individual education plan formulated by the State satisfied both. *Todd*, 299 F.3d at 906 n.3. Indeed, since the difference, if any, between the two standards was immaterial to the court's ruling, it would have been dicta to hold that one or the other was the required test.

The remaining cases cited in the petition as "squarely rejecting" a meaningful benefit standard do not address whether there are two standards, what the differences between the two may be, or which is the appropriate standard. The cases simply quote *Rowley* for the proposition that a FAPE is one that provides "some educational benefit" without addressing the content of that requirement. None of

the cases hold that courts cannot consider the extent of the child's capacity to benefit from an educational plan when determining whether that plan provides a FAPE. *Reid ex rel. Reid* addressed the availability of "compensatory education" as a remedy in an IDEA suit rather than what constitutes an "educational benefit." Following the Third Circuit's decision in *Ridgewood*, a "meaningful benefit" case, the *Reid* court concluded that compensatory education is an appropriate remedy, in part, because an IEP developed for a child injured by the earlier denial of a FAPE will be based on the child's current needs and capacities, rather than on the needs and capacities the child would have had if the earlier damage had not been done. 401 F.3d at 522. Thus, a new IEP will not compensate the child for the harm caused by an earlier, inappropriate IEP.

As in *Reid*, the District of Columbia Circuit does not address, much less "squarely reject" a meaningful benefit standard. Indeed, that court's favorable citation to *Ridgewood* indicates the District of Columbia Circuit has no quarrel with the meaningful benefit standard. In *Missouri Department of Elementary & Secondary Education*, it was uncontested that the school district lacked the resources to provide the disabled child with a FAPE. 358 F.3d 992, 997-8 (8th Cir. 2004). The issues on appeal were whether, under those circumstances, local or state representatives must be part of the child's IEP team; whether local or state representatives were responsible for paying for the child's educational services and whether certain fees and expenses were appropriately awarded to the parents of the disabled child. 358 F.3d at 998.

In *Maine School Administrative District No. 35*, the First Circuit also does not address the standards governing a FAPE, much less "squarely reject" the meaningful

benefit standard. Rather, it dealt primarily with the availability of attorneys' fees and compensatory education when the child had graduated from the public education system during the pendency of the litigation. 321 F.3d at 18-20. The case is apparently cited in the petition because, when giving an overview of IDEA, the opinion notes that IDEA requires states to provide "some educational benefit." *Id.* at 11 (citing *Rowley*).

The Seventh Circuit's decision in *Todd v. Duneland School Corporation* provides an excellent example of Petitioner's faulty circuit split analysis. *Todd* held in dicta that the IEP developed by the school district would be appropriate under either the some benefit test or the "slightly more stringent" meaningful benefit test, without adopting or rejecting either standard. Though Petitioner takes this to mean that the Seventh Circuit is a some benefit circuit, in *Alex R. ex rel. Beth R. v. Forrestville Valley Community United School District # 221*, it cites Fifth Circuit and Second Circuit meaningful benefit cases for the appropriate standard under IDEA. 375 F.3d 603, 615 (7th Cir. 2004) (quoting *Cypress-Fairbanks* and citing *Walczak*); *see also G ex rel. SSgt RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 306 (4th Cir. 2003) ("we must next address the question of whether [the child's IEP] was 'reasonably calculated' to provide [the child] meaningful educational benefit"); *School Bd. of Collier County v. KC*, 285 F.3d 977, 982 (11th Cir. 2002) (finding the Fifth Circuit's test for determining whether an IEP provided a disabled child with educational benefits "as least as stringent as our own"). As none of the circuits dispute IDEA's requirement that disabled children receive a meaningful educational benefit, as defined by the Sixth Circuit, review is not warranted.

III. The Petition Should Be Denied Based Upon The Interlocutory Nature Of The Case

Even if there is some minor divergence among the courts of appeals relating to the standard of benefits, this case presents a poor vehicle for the Court's consideration of the issue because it comes to this Court in an interlocutory posture.

First, because Petitioner does not challenge the court of appeals' holding that Petitioner violated IDEA by failing to provide a regular education teacher's participation in Zachary's IEP meetings and that this procedural violation caused Zachary substantive harm, this case must return to the district court for remedial proceedings regardless of this Court's consideration of the two issues Petitioner raises.[13]

Second, with respect to Petitioner's alleged substantive violation of IDEA, the Sixth Circuit remanded the issue to the district court so that the district court could consider whether Petitioner's proposed IEP would provide

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[13] Despite IDEA's requirement to place disabled children in a mainstream setting whenever possible, *Cedar Rapids*, 526 U.S. at 78, and the related requirement to have a "regular education teacher" attend IEP meetings, 34 C.F.R. § 300.344(a), Petitioner repeatedly failed to ensure the attendance of a regular education teacher at multiple IEP meetings even though placing Zachary into a less-restrictive environment was to be specifically addressed. Pet. App. 30a-31a. In finding that the Petitioner's repeated procedural violations harmed Zachary – and correcting the district court's erroneous conclusion that the regular education teacher missed only two IEP meetings – the Sixth Circuit found that in view of the Deals' objections that the IEP provided insufficient integration, "[t]he absence of the unique perspective that could have been provided by a regular education teacher therefore had a real impact on the decision-making process." Pet. App. 31a-32a.

Zachary with a meaningful educational benefit giving due deference to Tennessee's views. Depending on the outcome of these proceedings, Petitioner's challenge to the Sixth Circuit's "meaningful benefit" standard may become moot.

In short, review in this Court is both unwarranted and, at a minimum, premature. Indeed, because the district court will inevitably have to consider the appropriate relief for the IDEA violation that Petitioner does not challenge, review at this stage by this Court will not economize on judicial resources. Accordingly, the interlocutory nature of Petitioner's appeal presents yet another reason to deny review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-55

IN THE

Supreme Court of the United States

HAMILTON COUNTY DEPARTMENT OF EDUCATION,
Petitioner,

v.

MAUREEN DEAL; PHILLIP DEAL,
Parents on Behalf of ZACHARY DEAL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

In its petition, Hamilton County Department of Education demonstrated that there is a widespread split among the circuits on an important question of federal law: namely, whether the Individuals with Disabilities Education Act ("IDEA") requires participating States to provide disabled children "some educational benefit" that is measurable and nontrivial, or a "meaningful educational benefit." See Pet. 11-13. Respondents' opposition fails to show otherwise.

Contrary to respondents' claim, the division among the lower courts is not a matter of mere semantics with no practical impact on thousands of school boards and millions of children across the country. Indeed, in explaining why it was adopting the minority "meaningful-benefit" approach, the Sixth Circuit stressed the fundamental differences between these two standards. And, respondents' lengthy discussion of IDEA-related issues on which the lower courts agree is entirely irrelevant. Whatever consensus there is on these issues does not alter the fact that the lower courts disagree on the legal standard school boards must satisfy to show that they are providing a free appropriate public education ("FAPE"). The interlocutory nature of the decision below poses no barrier to review of this fundamentally important issue, or to review of the lower court's closely related, and equally flawed predetermination ruling.

1. This case squarely presents the issue of whether the IDEA's requirement that participating States ensure all disabled children receive a FAPE is satisfied when a school board provides a disabled child with "some educational benefit" that is measurable and nontrivial, as this Court indicated in *Board of Education* v. *Rowley*, 458 U.S. 176, 200 (1982), or whether they must instead satisfy a heightened standard by providing a "meaningful educational benefit." The majority rule of the First, Fourth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits requires States to provide

disabled children "some educational benefit." Pet. 11-12. In contrast, the minority rule of the Second, Third, Fifth, Sixth, and Ninth Circuits requires States to satisfy a heightened, amorphous, and inherently subjective meaningful-benefit test. *Id.* at 12-13. The latter standard, which originated in the Third Circuit's faulty reading of *Rowley* and the IDEA's legislative history in *Polk* v. *Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), portends grave constitutional and educational consequences. This test not only runs afoul of the Spending Clause's unambiguous obligation requirement, but it also encourages litigation on educational issues, which "will only serve to put further pressure on already scarce educational resources." Brief for *Amici Curiae* National School Boards Association, et al. (*Amici* Br.) 7.

Respondents try to obscure the division over this fundamental question of federal law by arguing that the circuits "uniformly recognize" the contours of a FAPE. Specifically, respondents contend that all circuits understand that a FAPE (1) requires meaningful educational *access*, (2) does not require potential-maximization, (3) should be individually tailored, and (4) requires mainstreaming to the extent possible. Opp. 18-21. This showing is entirely beside the point.

Consensus on these matters simply begs the question presented here of *how much* of an educational benefit must be provided. A court applying either the meaningful-benefit or some-benefit test, for example, must evaluate a child's "unique individual characteristics and abilities," *id.* at 20; without considering a child's cognitive skills and current performance, a court could not determine what educational benefit the child has received, and thus could not determine whether that benefit was meaningful (as the minority of circuits require) or measurable and nontrivial (as the majority of circuits require). The uniform requirement of individual

consideration, therefore, does not demonstrate the absence of a conflict on the substantive standard.

Nor is there any merit to respondents' contention that the different tests the circuits employ reflect nothing more than a "split based on semantics." *Id.* at 17. While respondents claim that the circuits "do not perceive any meaningful difference" between the two substantive standards, *id.* at 23, the Sixth Circuit itself plainly (and correctly) believed these substantive tests were meaningfully different. It categorically rejected the premise that an individualized education program ("IEP") provides FAPE so long as it "is reasonably calculated to enable the child to derive more than *de minimis* educational benefit." Pet. App. 33a. Reasoning that "[n]othing in *Rowley* precludes the setting of a *higher standard* than the provision of 'some' or 'any' educational benefit," *id.* at 35a (emphasis added), it held "an IEP must confer a '*meaningful* educational benefit,'" *id.* at 34a, and remanded for further fact-finding based on this heightened standard, *id.* at 40a. In fact, the Sixth Circuit went out of its way to note that "states providing no more than *some* educational benefit could not possibly hope to attain" what the lower court perceived to be the IDEA's "lofty goals." *Id.* at 38a.

Other courts that have adopted the meaningful-benefit test, *T.R.* v. *Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000), as well as those that have adopted the majority some-benefit rule, *A.B. ex rel. D.B.* v. *Lawson*, 354 F.3d 315, 319, 330 (4th Cir. 2004), *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 & n.3 (7th Cir. 2002), and *JSK ex rel. JK* v. *Hendry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991)), have also recognized that the two tests differ in a legally meaningful way. Like the Sixth Circuit below, for example, the Third Circuit has explained its own precedent as "squarely [holding] that '[t]he provision of merely "more than a trivial educational benefit" does not meet' the meaningful benefit requirement of *Polk*." *T.R.*, 205 F.3d at 577 (second alteration in original) (quoting *Ridgewood Bd. of Educ.* v.

N.E., 172 F.3d 238, 247 (3d Cir. 1999)). By contrast, the Eleventh Circuit has just as squarely rejected the meaningful-benefit test "to the extent [that] 'meaningful' means anything more than 'some' or 'adequate' educational benefit." *JSK*, 941 F.2d at 1572.

Indeed, the decision below illustrates a key distinction between the two tests. The Sixth Circuit explained that, under the meaningful-benefit test, "where self-sufficiency is a realistic goal for a child, a program that maximizes the possibility of self-sufficiency could be required." Pet. App. 38a n.17. By contrast, under the some-benefit test, a school board would not have to maximize the potential for self-sufficiency, as long as the IEP for the child resulted in measurable, nontrivial educational progress.

Respondents' elaborate efforts to parse and distinguish these cases on their facts, Opp. 23-28, cannot mask this clear conflict. Respondents concede (as they must) that the Eleventh Circuit "rejects a meaningful benefit standard," but they strain to distinguish the law in that circuit by contending that the court "equate[d] a [meaningful] benefit with potential-maximizing." *Id.* at 24. This is not true: the Eleventh Circuit rejected the meaningful-benefit test "to the extent [that] 'meaningful' means *anything more* than 'some' or 'adequate' educational benefit," *JSK*, 941 F.2d at 1572 (emphasis added)—*not* to the extent it "means potential maximizing."

Respondents likewise claim that, in adopting the some-benefit test in *A.B.*, the Fourth Circuit did not reject a meaningful-benefit standard, but only a potential-maximizing standard. Opp. 25. In fact, the Fourth Circuit's standard cannot be reconciled with the standard employed in the decision below. In *A.B.* as here, the disabled child derived a nontrivial benefit, see 354 F.3d at 328 (noting that the child was making academic progress in the public education system), but the parents demanded a program in which he would "perform[] at a much greater academic level than he

ha[d] done in the past." *Id.* at 330 (internal quotation marks omitted). The Fourth Circuit held that "this is *not* what the IDEA requires," and that the standards of a FAPE "are far more modest." *Id.* The district court employed this same standard below, ruling that Zachary had made academic progress under petitioner's methodology, and that petitioner was not required to provide the allegedly superior program respondents prefer. Pet. App. 60a-61a. Under the Fourth Circuit's some-benefit standard, the district court's decision plainly would have been upheld. The Sixth Circuit, however, reversed, not because it questioned whether Zachary had progressed under petitioner's methodology, but because it questioned whether that progress was "meaningful" given the "'remarkable'" results Zachary had achieved under the Lovaas-style program. *Id.* at 7a n.6 (citing ALJ's decision); *id.* at 40a (faulting district court for failing to accord greater deference to ALJ's findings).

Respondents' attempt to dismiss the Seventh Circuit's adoption of the some-benefit test, Opp. 24, 26, 28, fares no better. The Seventh Circuit held that the relevant substantive inquiry is "whether the IEP is reasonably calculated to provide *some* educational benefit to the child." *Todd*, 299 F.3d at 905 (emphasis added). In a footnote, the court explained that "*even if* we were to review the 1998 IEP under the Third Circuit's 'meaningful benefit' test, we would still affirm as the evidence amply satisfies that somewhat more stringent test." *Id.* at 906 n.3 (emphasis added). Contrary to respondents' view, see Opp. 26, this observation does not render the Seventh Circuit's adoption of the some-benefit test dictum. Rather, it is the court's observation that the challenged program would pass muster under a meaningful-benefit test that is dictum. That observation, moreover, makes clear that Seventh Circuit, like the Third, Eleventh and Sixth Circuits, understands the two tests to be different.

Respondents also suggest that the Seventh and Tenth Circuits are meaningful-benefit circuits because they cite

meaningful-benefit cases. Opp. 25-26, 28. In doing so, however, those courts carefully avoided adopting the meaningful-benefit test itself. Thus, the Seventh Circuit explained that an IEP "passes muster provided that it is 'reasonably calculated to enable the child to receive educational benefits' or, in other words, when it is 'likely to produce progress, not regression or trivial educational advancement.'" *Alex R. ex rel. Beth R.* v. *Forrestville Valley Cmty. United Sch. Dist. # 221*, 375 F.3d 603, 615 (7th Cir.) (quoting *Cypress-Fairbanks Indep. Sch. Dist.* v. *Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997), and citing *Walczak* v. *Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998)), *cert. denied*, 125 S. Ct. 628 (2004). Likewise, the Tenth Circuit cited a meaningful-benefit case for the proposition that IEPs need not "'"'enable the child to reach his or her full potential.'"" *O'Toole ex rel. O'Toole* v. *Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 708 (10th Cir. 1998) (quoting *Walczak*, 142 F.3d at 132).

Finally, respondents claim that the D.C. Circuit "simply quote[d] *Rowley* for the proposition that a FAPE is one that provides 'some educational benefit' without addressing the content of that requirement." Opp. 26. But the D.C. Circuit did address the content of that requirement. In *Reid ex rel. Reid* v. *District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), the court held that a compensatory award under the IDEA was one requiring, among other things, programs to make up for prior educational deficiencies. *Id.* at 522. The court distinguished this relief from prospective correction of a deficient IEP, noting that an IEP conforming to the some-benefit test "carries no guarantee of undoing damage done by prior violations." *Id.* at 523. By contrast, the meaningful-benefit test employed below would likely require an IEP to undo such damage, because an education that failed to compensate for earlier, redressable educational injuries could hardly be deemed meaningful.

2. Not only is this circuit split real, it has grave constitutional and educational consequences. As the *Rowley* Court warned, federal courts "lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" 458 U.S. at 208. Consistent with this warning, the objective some-benefit test prevents courts from entangling themselves in educational issues for which they lack expertise. Pet. 17. If a program provides a measurable educational benefit that is not merely trivial—if, in other words, "it is 'likely to produce progress, not regression or trivial educational advancement,'" *Alex R.*, 375 F.3d at 615 (internal quotation marks and citation omitted)—then a court's inquiry under the some-benefit test is at an end.

In contrast, the meaningful-benefit test will require federal courts to make subjective educational policy judgments for which they have no expertise. And, this in turn will force educators to practice a form of defensive (and unduly expensive) education. Pet. 17-18. Indeed, as *amici* explain, educating the rapidly growing population of autistic children is enormously expensive and entails complex medical and educational policy judgments that are the subject of ongoing debate. *Amici* Br. 8-11. The meaningful-benefit test improperly thrusts federal courts into the midst of this unresolved debate.

Additionally, the test runs afoul of the Spending Clause's "unambiguous" obligation requirement. Pet. 18. Indeed, given its inherent subjectivity, this test prevents States from determining the scope and nature of the obligations they are assuming when they accept federal education funds. Nor is this the only federalism concern the test raises. *Amici* Br. 15-18. For example, the IDEA "leaves states free to adopt a higher burden for establishing FAPE under state law, including a 'meaningful educational benefit' if states so desire." *Id.* at 17-18 (citing 20 U.S.C. § 1401(9)(B)). States

are denied this flexibility, however, under a standard that mandates such a result.

3. This case also raises a closely related and equally important question regarding the evidence necessary to establish the procedural violation of predetermination. As petitioner has previously explained, the lower court's finding of such a violation was inextricably intertwined with the central substantive question. Pet. 19; see also *Amici* Br. 14 ("At base, the predetermination decision is just another means of expressing the disagreement of the Sixth Circuit with the school district's determination of the educational methodology that should be employed to serve Zachary.").

Here, there is no dispute that Zachary received "some educational benefit." Thus, it is inaccurate to suggest, as the lower court did, that petitioner decided that "because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability," regardless of whether the program provides an educational benefit to a particular child. Pet. App. 28a-29a. Rather, in finding predetermination here, the lower court effectively ruled that it is unlawful for a school system to decide to use an existing program that affords a child a nontrivial educational benefit, even though other, more expensive programs may confer greater benefits on that child.

This ruling has profound implications for school boards. It allows parents to dictate unilaterally their children's IEP placements by inflexibly adopting hard bargaining positions, then arguing that the school board's failure to accede to some or all of those demands is evidence of predetermination. It also discourages expert educators from preparing diligently for IEP meetings and using their best educational judgment, and invites litigation. *Amici* Br. 13-15. Finally, the test inappropriately penalizes educators working in a world of limited resources for considering the cost implications of an educational program for one student.